STATE OF MICHIGAN

COURT OF APPEALS

ESTATE OF BENJAMIN BATSON and HOWARD KEELS,

Plaintiffs-Appellants,

and

LEONARD HEARD,

Plaintiff,

v

AC ROCHESTER DIVISION DELCO ELECTRONICS CORPORATION, SKIP DAVIS, and GEANNE PEPPER,

Defendants-Appellees.

UNPUBLISHED
April 17, 2003

No. 228944
Genesee Circuit Court
LC No. 96-050878-CZ

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Plaintiffs-appellants appeal as of right from a judgment of no cause of action, following a jury trial. We affirm.

Plaintiffs[1] are African-Americans who worked as union employees for defendant Delco Electronics Corporation in Genesee County. The individual defendants were employed by Delco as supervisory or labor relations personnel. On March 8, 1995, a Caucasian union employee stated that he observed three African-American men attempting to steal a tire from a vehicle in the employee parking lot. He subsequently identified plaintiffs as the three men he observed. Plaintiffs were suspended and ultimately discharged from employment in March 1995. In July 1995, defendants offered to reinstate plaintiffs without back pay if they would agree to sign a statement holding the company and union harmless. Plaintiff Leonard Heard accepted the offer, but the other plaintiffs declined. Plaintiffs Benjamin Batson and Howard Keels settled their

[1] Plaintiff Benjamin Batson died on April 25, 1999, while this case was pending in the trial court. His estate was substituted as a party plaintiff.

grievances in December 1995 and returned to work after January 1, 1996. They were not required to hold defendants or the union harmless. While plaintiffs were off work and, allegedly after they returned to work, defendants caused plaintiffs' photographs to be posted on a guard shack wall. The photographs were visible to other employees who reported to the guard shack. Plaintiffs filed suit on September 17, 1996, alleging racial discrimination and defamation.

I. Undisclosed Witness

Plaintiffs initially argue that the trial court abused its discretion when it denied their request to present Ms. Joann Williams as a witness. The trial court denied this request because plaintiffs failed to disclose Ms. Williams' name to the court before or during jury voir dire.[2] We note that the trial court specifically questioned plaintiffs regarding the existence of any further witnesses before trial commenced. A trial court's decision to exclude the testimony of an undisclosed witness is reviewed for an abuse of discretion. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90; 618 NW2d 66 (2000); *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 296; 616 NW2d 175 (2000).

After defendants' counsel questioned several of plaintiffs' witnesses regarding the dates that they had observed the photographs in the guard shack, plaintiffs' attorney asked to present Ms. Williams as a "possible new witness." According to plaintiffs, Ms. Williams, a Pinkerton security guard, would have testified that she remembered all three photographs being posted on the guard shack wall through January 1996. Plaintiffs argued that Ms. Williams' testimony would not amount to undue surprise because defendants' attorneys interviewed her regarding this issue a few months before trial. Nevertheless, the trial court excluded this testimony, noting the "great care" that had been taken during jury voir dire to name all witnesses and eliminate anyone with contacts to defendant employer. The trial court concluded that it would be prejudicial to voir dire the jury in the middle of trial to determine their familiarity with a new witness.

It is undisputed that both parties were familiar with Ms. Williams and what her testimony might entail. Thus, plaintiffs' failure to file a witness list, while contrary to the trial court's order, is not egregious in this instance because "[t]he purpose of witness lists is to avoid 'trial by surprise.'" *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993), quoting *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 779; 404 NW2d 665 (1987). However, the trial court in this case allowed plaintiffs to name potential witnesses on the day of trial before and during jury voir dire. We further find no merit to plaintiffs' argument that they were surprised when defendants raised the statute of limitations defense. Indeed, defendants listed the statute of limitations as an affirmative defense in their answer to plaintiffs' complaint. On this record, we cannot say that the trial court's decision to exclude Ms. Williams' testimony evidenced a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000).

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[2] Plaintiffs did not file a written witness list with the trial court.

II. Statute of Limitations

Plaintiffs next contend that the trial court erroneously determined that any defamation claim arising before September 17, 1995 was time-barred. According to plaintiffs, because the photographs were continuously displayed over a period of time, their claims did not accrue until the photographs were removed from the wall. Absent a factual dispute, whether a claim is barred by the applicable statute of limitations is a question of law subject to review de novo. *Jackson Co Hog Producers v Consumers Power Co,* 234 Mich App 72, 77; 592 NW2d 112 (1999).

"The period of limitations is [one] year for an action charging libel or slander." MCL 600.5805(8);[3] *Wilson v Knight-Ridder Newspapers, Inc,* 190 Mich App 277, 279; 475 NW2d 388 (1991). Except as otherwise provided by statute, the period of limitation begins to run when a claim accrues. MCL 600.5827. In a case such as this, "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. A cause of action in tort generally accrues when all the elements of the cause of action, including damages, have occurred and can be alleged in a proper complaint. *Travelers Ins Co v Guardian Alarm Co,* 231 Mich App 473, 479; 586 NW2d 760 (1998); *Davidson v Bugbee,* 227 Mich App 264, 269; 575 NW2d 574 (1997).

Plaintiffs assert that their defamation claim is a wrong that continued from the date the photographs were first displayed until they were taken down. "The continuing-wrongful-acts doctrine states that where a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore a separate cause of action can accrue each day that defendant's tortious conduct continues." *Jackson Co, supra* at 81, quoting *Horvath v Delida,* 213 Mich App 620, 626; 540 NW2d 760 (1995). In support of their position, plaintiffs cite *Chesebro v Powers,* 78 Mich 472; 44 NW 290 (1889), a case involving slander of title. In *Chesebro, supra* at 479, our Supreme Court determined that the statute of limitations did not bar the plaintiff's claim because the wrong was considered a "continuing grievance" that started with the recording of the deed and continued until a few months before the claim was filed. Plaintiffs' suggest that their defamation claim is analogous to *Chesebro* because their pictures were continuously displayed for a lengthy period of time.

We reject plaintiffs' request to extend the continuing-wrongful-acts doctrine to this case. To establish a defamation claim, a plaintiff must show, inter alia, an unprivileged publication to a third party of a materially false statement concerning the plaintiff. *Burden v Elias Brothers Big Boy Restaurants,* 240 Mich App 723, 726; 613 NW2d 378 (2000). Case law is clear that a defamation claim accrues, and the limitation period begins to run, when the alleged defamation is published regardless of when damage results. *Wilson, supra* at 279; *Grist v Upjohn Co,* 1 Mich App 72, 81; 134 NW2d 358 (1965). "When a right of action for slander has been once barred by the statute of limitations, it cannot be revived by an admission of defendant that he did utter the slanderous words, *nor can the running of the statute be prevented by repetitions of the slander,*

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[3] We note that 2002 PA 715, effective March 31, 2003, redesignated former subsection (8) to subsection (9).

although of course a separate action will lie for any repetition within the statutory time." *Grist, supra* at 81 (emphasis in original), quoting 37 CJ, Libel and Slander, § 314, p 17.

The evidence in this case did not establish that plaintiffs' photographs were reposted daily. Therefore, plaintiffs' defamation claims accrued in March 1995, when their photographs were first posted in the guard shack. Further, although we disagree with the trial court's ruling that a new publication occurred each day the photographs appeared, the trial court properly determined that any claim for conduct occurring before September 17, 1995, was barred by the statute of limitations. Moreover, any error in the trial court's original ruling is harmless, given the jury's verdict that the evidence did not establish that the photographs were published after September 16, 1995. Accordingly, we need not consider plaintiffs' argument regarding the appropriate jury instructions for defamation on remand.

III. Jury Instructions

Plaintiffs further maintain that the trial court improperly refused to instruct the jury that it could infer racial discrimination if it disbelieved defendants' explanation for firing plaintiffs. Specifically, plaintiffs' counsel requested a jury instruction "along the lines of the *Smith*[4] case." In *Smith, supra* at 280, the Court of Appeals for the Third Circuit determined that:

> jurors must be instructed that they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up the prima facie case have been established and they disbelieve the employer's explanation for its decision.

We find no error with the trial court's decision to give the standard jury instructions on discrimination.

Claims of instructional error are reviewed de novo. *Case v Consumers Power Co,* 463 Mich 1, 6; 615 NW2d 17 (2000). "Jury instructions should include 'all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them.'" *Cox v Flint Board of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002), quoting *Case, supra* at 6. However, instructional error does not warrant reversal unless it is apparent to the reviewing court that failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Case, supra* at 6.

Michigan's Civil Rights Act prohibits an employer from discriminating against an applicant because of race. MCL 37.2202(1)(a). Absent direct evidence of discrimination, a plaintiff must proceed under the shifting burdens of proof articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle v Ford Motor Co,* 464 Mich 456, 463-464; 628 NW2d 515 (2001). Under the *McDonnell Douglas* analysis, a plaintiff

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[4] *Smith v Borough of Wilkinsburg,* 147 F3d 272 (CA 3, 1998). We note that the Court in *Smith* recognized that there is a split in the federal circuit courts regarding whether it is appropriate to instruct juries on the *McDonnell Douglas* burden-shifting approach to employment discrimination cases. *Id*. at 279.

must prove that: (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Id.* at 463. If a plaintiff establishes a prima facie case under this analysis, "a presumption of discrimination arises." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). Thereafter, the defendant bears the burden of articulating a legitimate, nondiscriminatory reason for its employment decision. *Hazle*, *supra* at 464. "If the employer makes such an articulation, the presumption created by the *McDonnell Douglas* prima facie case drops away." *Id*. at 465.

In *Hazle*, *supra* at 457-458, a recent employment discrimination case, the Michigan Supreme Court granted leave "to further clarify the proper application of the burden-shifting framework established in [*McDonnell Douglas*], for the purpose of analyzing proofs in discrimination cases." Specifically, the Court stated:

> [F]or purposes of claims brought under the Michigan Civil Rights Act, the *McDonnell Douglas* approach merely provides a mechanism for assessing motions for summary disposition and directed verdict in cases involving circumstantial evidence of discrimination. It is useful only for purposes of assisting trial courts in determining whether there is a jury-submissible issue on the ultimate fact question of unlawful discrimination. The *McDonnell Douglas* model is *not* relevant to a jury's evaluation of evidence at trial. Accordingly, a jury should not be instructed on its application. [*Id.* at 466-467 (footnote omitted).]

While this discussion is dicta on the issue of jury instructions, because *Hazle* involved a grant of summary disposition to the defendant and not a jury verdict, we find it persuasive. Therefore, we conclude that the trial court did not err in declining to instruct the jury on the burden-shifting analysis of *McDonnell Douglas.*

IV. Mediation Sanctions

Plaintiffs also maintain that the trial court's award of mediation sanctions based on a joint award was improper.[5] A trial court's decision to grant or deny mediation sanctions is reviewed de novo. *Dessart v Burak*, 252 Mich App 490, 494; 652 NW2d 669 (2002). Interpretation of a court rule presents a question of law that is also reviewed de novo on appeal. *Id.*

The mediators in this case awarded $60,000 for all plaintiffs, and against all defendants, without apportioning liability or damages. The parties subsequently rejected this award. Plaintiffs now contend that, pursuant to MCR 2.403, each plaintiff should have had the right to settle individually. While we agree that the court rule mandates individual evaluations rather than aggregate evaluations in cases involving multiple parties, see MCR 2.403(K)(1)-(2), (L)(3),

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[5] We note that MCR 2.403 was amended, effective August 1, 2000, to change the term "mediation evaluation" to "case evaluation." Because the pertinent events in this case occurred before the amendment to the court rule, we use the term "mediation" in this opinion. *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 481-482; 442 NW2d 705 (1989).

and (O)(4), we note that plaintiffs contributed to this error by expressly agreeing to the mediation procedure followed in this case. "Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997). Thus, plaintiffs are not entitled to relief on this issue.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper